

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

THOMAS JAMES EARLS,

Defendant-Appellee.

UNPUBLISHED

October 3, 2006

No. 267976

Sanilac Circuit Court

LC No. 05-006016-FC

Before: Fitzgerald, P.J., and Saad and Cooper, JJ.

SAAD, J. (*dissenting*).

I respectfully dissent because defendant has no reasonable expectation of privacy in his banking records¹ and because the relevant statute, MCL 76A.1 *et seq*, regarding the issuance of investigatory subpoenas affords defendant neither standing nor rights under the statute.²

¹ In *United States v Miller*, 425 US 435, 442-443; 96 S Ct 1619; 48 L Ed 2d 71 (1976), the United States Supreme Court expressly held:

The depositor takes the risk, in revealing his affairs to another, that the information will be conveyed by that person to the Government. This Court has held repeatedly that the Fourth Amendment does not prohibit the obtaining of information revealed to a third party and conveyed by him to Government authorities, even if the information is revealed on the assumption that it will be used only for a limited purpose and the confidence placed in the third party will not be betrayed. [*Id.* at 442-443 (citations omitted).]

Further, our Supreme Court in *People v Perlos*, 436 Mich 305, 320, 329; 462 NW2d 310 (1990), quoted with approval the above excerpt from *Miller* and adopted the holding and rationale of *Miller*.

² A careful reading of MCL 76A.1 *et seq* makes clear that the rights afforded under the statute are granted to the institutions upon which the investigatory subpoenas are served. MCL 76A.1 through MCL 76A.9 exhaustively detail the rights of the institutions subpoenaed and afford no rights to a person in defendant's position, whose records are at the subpoenaed bank. The only rights afforded to defendant under MCL 76A *et seq*, are certain discovery rights once a charge has been filed against defendant. MCL 76A.5(6).

Moreover, even if MCL 767A.1 *et seq* could be read to grant defendant standing or rights under the statute, the prosecutor's admittedly mistaken failure here to abide by the statute does not warrant exclusion of the evidence, defendant's banking records.³ Under Michigan case law, the "drastic remedy" of excluding evidence that would otherwise support a criminal conviction should only be applied to constitutional violations, absent here, or to a violation of a statute, but only where the Legislature has evidenced its intent that the exclusionary rule should apply, also absent here.

Accordingly, I respectfully dissent.

/s/ Henry William Saad

³ *People v Hawkins*, 468 Mich 488, 500; 668 NW2d 602 (2003). Again, assuming the statute was violated with respect to defendant,

"the drastic remedy of exclusion of evidence does not necessarily apply to a statutory violation. Whether the exclusionary rule should be applied to evidence seized in violation of a statute is *purely a matter of legislative intent*. [*Id.* (emphasis added).]

The aforementioned discussion of our case law is equally applicable to the records subpoenaed from the telephone company.